



BEYOND SOVEREIGNTY? THE STATE AFTER THE FAILURE OF SOVEREIGNTY

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ABSTRACT

Sovereign state power, absolute and unlimited, were supposed to guarantee the lives and property of citizens. Instead, states became vectors for mass violence. The model of sovereignty failed in global wars of mass destruction at the same time as the destructive technologies linked the entire world in near instant communication and travel. Thus, the possibility for global governance confronted the reality of an archaic and inapt juridical concept. Sovereignty must therefore be reconceptualized and understood as a relative and partial power shared at multiple levels in an intensively networked world.

I. SOVEREIGNTY

A. *Definition of Sovereignty*

The sovereign power is defined as the highest authority having general and final effects at law.¹ Sovereignty is the supreme power of the state and is unconditional.² This supreme power is absolute, independent, and without

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1. The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.

BLACK'S LAW DICTIONARY 1396 (6th ed. 1990); *See also*, Dictionnaire de la Pensée Politique 735-36 (1989).

2. *See, e.g., Cherokee Nation v. S. Kan. R.R. Co.*, 33 F. 900, 906 (W.D. Ark. 1888) (Wheaton defines sovereignty, "the supreme power by which any citizen is governed." Hurd says: The supreme power in the state must necessarily be absolute, in being subject to no judge. "Jameson says: By the term 'sovereignty' is meant the person or body of persons in a state to whom there is politically no superior." Leiber has said: "The necessary existence of the state, and that right and power which necessarily follow, is sovereignty." Story says: "By sovereignty, in its largest sense, is meant supreme, absolute, uncontrollable power; the *jus summi imperii*; the absolute right to govern." Yeaman, in his *Study of Government*, says: "This sovereignty is the last and supreme will in the direction and control of the affairs of society, and beyond or above which there is no political power, and no legal appeal. The word which by itself comes nearest being the definition of sovereignty is will or volition, as applied to political affairs. Government is not sovereignty. Government is the machinery or expedient for expressing the will of the sovereign power." Definitions of sovereignty might be almost indefinitely multiplied, but these which have been given I believe to

control.³ It is a total power, perpetual, indivisible, and unlimited⁴ over life and death issues. The sovereign power of the state is analogous to the right of property. It is an absolute power of the sovereign over the life of the subjects of the sovereign and all property in its territory.

B. Analogies between Sovereignty and the Ruler to Property and Family

We can see from this that the state as a social relationship to the subject is modelled after a property relationship. The subjects are analogous to the property of the state and in its religious variants the state and the king, "owners" (sovereigns) of subjects, are themselves in turn the property of the gods.

Another model is that the state grew from and is a likeness of an extended family. This model of the state is paternalistic. The accuracy of this comparison is obvious when we recall that the Roman patriarch had the absolute right to dispose of the life and property of his children.⁵ Thus, it seems that the ultimate foundation of the legal concept of "sovereignty" in civil law countries is found in an extension of private family and property law to the design of state. Thus, these two models are mutually reinforcing.

I criticize the analogy between sovereignty and property because, though legally accurate, this relation puts people in a sort of tutelage, as property of the state or like a minor child of the sovereign. Foucault identifies the problem more precisely in his critique of sovereignty: that the sovereign power is the extension of the body of rulers on the body politic, social, and individual governed.⁶ Foucault's critique holds for both analogies.

be sufficient to give an accurate idea of its nature. This sovereign power in our government belongs to the people, and the government of the United States and the governments of the several states are but the machinery for expounding or expressing the will of the sovereign power. (internal citations omitted);

See also Gerard Cornu, *VOCABULAIRE JURIDIQUE* 754 (1987).

3. BLACK'S LAW DICTIONARY 1252 (5th ed. 1979).

4. See *Gherebi v. Bush*, 352 F.3d 1278, 1296 (9th Cir. 2003)

(Black's Law Dictionary, defines sovereignty, in pertinent part, as: The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will . . . *The power to do everything in a state without accountability* . . . It is the supreme power by which any citizen is governed and is the person or body of persons in the state to whom there is politically no superior. By sovereignty in its largest sense is meant supreme, absolute, uncontrollable power . . . the word by itself comes nearest to being the definition of 'sovereignty' is will or volition as applied to political affairs (emphasis added)).

See also *DICTIONNAIRE DE LA PENSÉE POLITIQUE*, *supra* note 1, at 741.

5. Lisa A. Morin, *Roman Family & Law Traditions*, <http://bama.ua.edu/~morin002/> (last visited Oct. 9, 2008).

6. JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* 60 (1992).

Sovereignty can also be criticized as patriarchal (men almost always hold the reigns), and paternalist (the welfare state). Sovereignty is also worthy of critique because sovereignty does not help in identifying and resolving practical contemporary problems. This is for at least four reasons:

- 1) the world is interdependent. A plurality of power indicates that between them no authority could be final;
- 2) the sovereign power—an absolute power—is inevitably capable of being abused, because it is an unlimited power;
- 3) the definition of state power is unilateral: the state has all the rights and none of the duties; and
- 4) the sovereign power is incapable of solving real social problems.

Instead of addressing how to manage an interdependent world, sovereignty sought to defend the autarchic nation state. That model has become unrealistic. First, nation states, if they ever existed, are no longer the dominant form of states—multinational and federal states are now dominant. Second, the sovereignty model of the nation state is unrealistic because states no longer have the absolute power to make war, happily, for atomic weapons make war so destructive that it is in practice unrealistic.

To carry out our critique of sovereignty we will consider the history of the definition of power and its historical development.

C. Origins of the Sovereign Power

1. Religious Justification: Auctoritas

In our analysis of sovereign power, if we go back to its intellectual and historical sources, we are brought face-to-face with two concepts: *auctoritas* and *potestas*. This is a duality which describes the relationship between power (*potestas*) and authority (*auctoritas*) as united under the sign of sovereignty.⁷ Let us first analyze *auctoritas*.

Authority (*auctoritas*) is the moral right to rule. The reasons for this right will change over time—religious regimes, aristocracies, oligarchies, republics, democracies *et cetera*—each use a principle to legitimize themselves in the eyes of citizens and other legal persons. Camilleri divides authority into three parts: moral authority, customary authority and coercive authority.⁸ For example, with respect to the European Union (EU), the authority of the Union is found

7. Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben's State of Exception*, 17 EUR. J. INT'L L. 677, 683 (2006). See also Albert Rigaudière, *L'invention de la souveraineté*, dans *Pouvoirs*, 67, 5, 6 (1993).

8. CAMILLERI & FALK, *supra* note 6, at 19.

in moral positions—peace is desirable, and in the historical experience of war. The coercive power of the EU is essentially limited—centering on adjudication of customs, trade, and human rights. But the EU has an auctorial and a moral right to rule beyond its powers. Auctoritas, indeed, may be assimilated to naturalist theories of law—that the sovereign is sovereign because it is fair.

2. Political Reality: Potestas

Power (*potestas*), in contrast, is the real fact of power—otherwise known as force. To continue our analogy, *potestas* is analogous to positive law, the law of the strongest. By way of example, rebels have *potestas* without *auctoritas*. Religious rulers have *auctoritas* without *potestas*.

This division between *auctoritas* and *potestas* seems to be connected to the fall of the Roman Empire and the growth of the church, the former losing power, the latter maintaining authority: a decline of the imperial forces, but a preservation of religious institutions. These institutions had no power but could legitimize the brutal conquerors. In any case, the ruler is he who unites these two principles.

Yet, this justification is circular: The circularity of this design appears when one perceives that power (*potestas*) is justified by its success—power is self-justifying. The ability to govern (*potestas*) justifies that power. Conversely, those who do not have the power to rule obviously also lack merit and therefore their powerlessness is also justified. In other words, in practice, *auctoritas* cannot delegitimize *potestas*. By contrast, a *potestas* can also become an *auctoritas* simply by custom. Thus moral authority, as a separate source of legitimating from physical power, becomes increasingly marginalized to the point that power replaces it in toto and *auctoritas* becomes purely symbolic.

This duality also hides conflicts for the absolute power that is sovereignty. Those who have lost their last round of a power struggle nevertheless assert their authority, while those who hold power seek to expand their authority. This pointless and destructive game seems inherent to the absolute definition of sovereignty ('winner take all') and so a new definition of the relations between the state, citizen, and ruler is desirable.

II. HISTORICAL SOURCES

We have just seen a little of the medieval history of sovereignty which defines its moral and legal content. We now extend our historical analysis to explain why the concept of sovereign power is unfit to manage the contemporary world.

A. History of the State

The nation state is a consequence of religious wars. The Treaty of Westphalia established the principle that the people of a nation would obey the religion of their prince.⁹ Through the unity of faith and state it was hoped to avoid the wars of religion, which characterized the 16th and 17th centuries. Unfortunately, the historical experience shows that the nation state, the successor to the religious state, was also bloody. This explains why the nation state is being replaced by international and sub-national organizations.

B. Transformation of Feudal Sovereignty into Liberal Sovereignty

One might suppose that the transfer of the absolute power of a prince to a legislative assembly would have improved the situation. But when we examine the relationship between the citizen and the state, we see the citizen is still subject to an absolute and in fact unlimited power.

The problem with the concept of sovereignty under the liberal state is as follows: The historic conception of sovereignty consisted simply of a transfer of absolute powers of a prince to a representative assembly. Thus, the liberal revolutions did not reconceptualize the nature of their power—just the source of their power.

III. CRITIQUES OF SOVEREIGNTY

A. Theoretical Aporia

If one defines sovereignty as an absolute and final power, paradoxes and questions result. Which body is the holder of that absolute power? There are several possible responses—the parliament, the people, or the state. Further, the term sovereignty is polysemic.¹⁰ One can distinguish several different types of sovereignty:

- 1) the quality of independence of any state in relation to external powers;¹¹
- 2) the supremacy of the state's power;¹² and
- 3) the quality of an organ of state as supreme power.¹³

9. See generally Treaty of Westphalia, Fr.-Holy Roman Empire, Oct. 24, 1648, available at http://www.avalon.law.yale.edu/17th_century/westphal.asp (last visited Oct. 24, 2008).

10. See, e.g., Cherokee Nation, *supra* note 2; Michel Troper, *La Titulaire de la souveraineté*, in RECHTSTHEORIE, RULE OF LAW, 137, 137 (1997).

11. Troper, *supra* note 10, at 139.

12. *Id.*

13. *Id.* See also Susi Dwi Harijanti & Tim Lindsey, *Indonesia: General Elections Test the Amended Constitution and the New Constitutional Court*, 4 INT'L J. CONST. L. 138, 144 (2006).

These definitions may be complementary but developing the concept of sovereignty is difficult due to polysemy.

Apart from the difficulties in defining the body which holds the sovereign power, we can criticize sovereignty as it presents some logical paradoxes.

B. Paradoxes of the State

The first paradox raised by the state is a form of circularity: the state is both a creator of law and is created by the law it creates.¹⁴ This fiction is resolved by a simple recognition that the state is ultimately a legal fiction and is not a real entity.

Another paradox of state is the fact that if the state claims to hold absolute power and unlimited power then it cannot be limited.¹⁵ In other words, the rule of law is logically impossible in a sovereign state. An absolute power is by definition an unlimited power. Thus, the ideas of sovereignty and the rule of law are logically incompatible. We can integrate this paradox simply by recognizing that the state is a legal fiction. The existence of these paradoxes tends to refute the Kantian and Hegelian view of the state as the ideal entity—which expresses the spirit of the world and supports our criticism of the international system as it is based on the nation state.

C. Sovereignty of Nation States led to Pointless, Bloody and Destructive Wars

In the end the myth of the nation state proved itself to be a bloody nightmare. Rather than enabling humans to reach their maximum capacities, the nation state had become an idol which sought human sacrifices on the plains of Belgium in 1914¹⁶ and throughout the European continent between 1939 and 1945. Because of this experience, the nation state has been delegitimized as a source of authority. This explains the apparent powerlessness of European states to resist economic and political integration via the EU. Although the EU has no real democratic content and so is also not legitimate, unlike any state of the European continent, it does not have a history of continental military ambitions which led to the human sacrifices of 1914–1945. The nation state is obsolete because of historical events and technological changes. The question is how to develop institutions capable of solving the real problems of our world—the answer is a reconceptualization of sovereign power.

14. Pater Suber, *The Paradox of Self-Amendment in Constitutional Law*, STAN. LIT. REV., Spring/Fall 1990, 53, 55, available at <http://www.earlham.edu/~peters/writing/psaessay.htm>.

15. "How can a power supposed to be omnipotent irrevocably limit itself?" *Id.* at 55.

16. See, e.g., ROBERT GERWARTH, *TWISTED PATHS: EUROPE 1914–1915* 91 (2007).

In sum, the source of the delegitimizing of the legal form nation state, and especially its expression in the states of the European continent, is a violent history.¹⁷ The promise of the EU is to replace the dynamics of deadly competition of nation states with a positive interdependent cooperation between the countries of Europe.¹⁸ But as the EU lacks a real democratic basis, it remains an elite toy for ministers and other officials to satisfy their personal ambitions without taking into account the needs of Europeans who do not belong to the class of elites. This is the famous “democratic deficit.”

D. The Description of Reality Proposed by the Concept of National State is Inexact

The nation state is based on the presupposition of the existence of a mythical community—“the people” and the existence of a transcendent entity corresponding to a geographical location which includes these people.¹⁹ But in fact, the state is a legal fiction and correspondence between the myth and objective reality is only partial, and can only be partial.

1. The Existence of a People is a Myth. Its Correspondence to Reality is only Partial

A major flaw of the myth of the idea of the nation state is the simple fact that defining “the people” is impossible. For example, how do we define the French people? According to a theory of birth on French soil? According to a historical membership in the Gallo-Romans? In this case, what of the Franks, a francophone Germanic people? Does one include colonized peoples in the idea of “France?” Linguistic, ethnic and religious groups have always had only partial correspondence with political boundaries and different identity groups are cross cutting and at times in conflict. This lack of correspondence was precisely the very justification of the series of wars in Europe (Alsace/Elsass is not the only example).²⁰ In addition, the congruence between “nation” (ethno-linguistic entity) and an area of trade made economic interactions zero sum thereby increasing tensions, creating another justification for war. The unity of geography, people, and trade encouraged commercial and political wars for commercial reasons.²¹ In other words, even when there is a more or less

17. ALEXANDER OLTEN, *THE EUROPEAN CRUCIBLE* (forthcoming) (manuscript at Ch. II, pg. 18).

18. Europa, *The History of the European Union*, http://europa.eu/abc/history/index_en.htm (last visited Oct. 9, 2008).

19. CAMILLERI & FALK, *supra* note 6, at 54.

20. Olli Lagerspetz, *National Self-Determination and Ethnic Minorities*, 25 MICH. J. INT’L L. 1299, 1313 (2004).

21. Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius’ De Iure Praedae—The Law of Prize and Booty, or “On How to Distinguish Merchants from Pirates,”* 31 BROOKLYN J. INT’L L. 741, 804 (2006).

accurate match between “nation” and “state,” this correspondence only encourages economic autarky, which not only hinders trade but also encourages wars of predation, expansionism, and nationalist crusades. The nation state does not in any way guarantee peace abroad and even encourages war by unleashing several reinforcing polarizing extremist dynamics.

The second conceptual problem of “sovereignty” is the necessary but fictional connection between the “people” as an ethnic fact, the state as a juridical space, and the idea of the sovereign. But this fiction is not always appropriate. Thus, the nation state is characterized by a certain disconnect between reality (ethno-linguistic and political facts) and the legal conceptions about those facts (the state as a legal fiction, a juridical construct).²² The nation state does not correspond to reality, probably cannot correspond to reality and definitely should not be the fundamental basic unit of the international system because nation states lead to wars for resources and market share.

2. The State has no Transcendental Existence as an Ideal Type: The State is in Fact an Assembly of Fictions and Myths.

Another difficulty that we encounter in our analysis of sovereignty is the fact that “the state” is a legal fiction. In legal terms, this is in theory not at all problematic. But in contrast, in the world of practice, mythography since Plato has sought to anthropomorphize the fiction by providing it a real existence as a transcendent entity.²³ The most striking recent examples of this are Kant and

22. See Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5, 12 (2008). See also Joseph Krulic *La Revendication de la Souveraineté*, *Pouvoirs* 67, 31–32 (1993).

(D’une part, la nation déracine l’individu scolarisé et urbanisé des communautés . . . locales et l’intègre dans un group plus global dont les idéologies d’intégration nationales, voire nationalistes, le persuadent qu’elle constitue une communauté naturelle matricielle. Cet ensemble sociologique de rebricolage idéologique organiciste que constitue la nationa inter-pose, ou veut interposer, entre le marché international, l’économie monde et l’individu atomisé, une communauté de substitution, d’autant plus nécessaire que les autres cadres (religions, idéologies familles) se trouvent érodés.) (On the one hand, the nation uproots the individual, scholarised and urbanised into . . . local . . . communities . . . and integrated into a more global group in which the ideologies of national, including nationalist, integration persuade him that they constitute a natural womb-like community. This sociological assembly of ideological organic “do it yourself” projects which constitutes the nation interposes, or wants to interpose, between the international market, the world economy and the atomised individual a substitute community necessary as much as the other frameworks (religions, ideologies, families) are eroded.).

Id.

23. GEORGE E. KARAMANOLIS, *PLATO AND ARISTOTLE IN AGREEMENT: PLATONISTS ON ARISTOTLE FROM ANTIOCHUS TO PORPHYRY* 236 (2006).

Hegel, who see the state as the supreme expression of human beings. However, seeing the state as the product of a dialectical idealism leads to valuing it above the human.²⁴ The consequence was a subordination of the individual to the state, the glorification of the state, and a justification for national wars,²⁵ which delegitimizes the structure which they proposed to serve—the nation state.

3. No Contemporary State is Autarchic: The State Today is Interdependent

Another problem with the idea of sovereignty is the fact of interdependence. No state today is truly independent, except perhaps North Korea. Moreover, the finality of state autarchy is not desirable. Historically, autarchy has led to foreign wars and internal repression. One state cannot intervene in another's internal affairs; subjects of a state cannot appeal the decisions of a sovereign over them. On behalf of the glory of state X, I take/rape/kill you—those are the statements of traditional sovereignty.

Autarchy and independence among states today are exceptional. This is because autarchy leads to poverty and war. To say that any given state authority is final and independent is not really possible. Economic reality no longer corresponds to the historical model of sovereignty still implemented in the legal definitions of the state and sovereignty. This fact explains why it is necessary to build democratic institutions of governance at the international level.

Historically, the problem of sovereignty is an incorrect definition of powers under the monarchies, then a transfer of these badly defined powers to liberal democracies which resulted in wars and repression. Logically speaking, because the fundamental definition of the state and sovereignty is wrong, the consequences which follow from these wrong definitions will likely also be wrong.

IV. CONCLUSION: THE OBSOLESCENCE OF THE IDEA OF SOVEREIGNTY

The concept “sovereignty” is obsolete. One reason for this obsolescence is globalization.²⁶ Another is the growing number of states which today's

24. See, e.g., Edward W. Younkins, *Capitalism & Commerce: Hegel's Authoritarian State as the Divine Idea on Earth*, Nov. 15, 2005, <http://www.quebecoislibre.org/05/051115-11.htm>. (last visited Oct. 19, 2008).

25. *Id.*

26. Susan Bibler Coutin, Bill Maurer, & Barbara Yngvesson, *In the Mirror: The Legitimation Work of Globalization*, 27 LAW & SOC. INQUIRY 801, 804 (2002). See also Joseph Krulic, *La Revendication de la Souveraineté*, 67 Pouvoirs 24 (1993). (“Economiquement, dans un monde d'une économie de grands espaces et de mondialisation, il semble avéré que la souveraineté est largement fictive ou illusoire.”). *Id.* (Economically, in a world of an economy consisting of great spaces of globalization, it seems true that sovereignty is largely fictive or illusory).

number is around 200.²⁷ The idea of a state corresponding to each nation and vice versa proves itself in the end to be an impossible fiction. Who are the Indian people? Or the Americans? Diversity of religion, language, and ethnicity indicates that the finding of the state in or founding it on a nation is impossible. The so-called national states, which are often multi-ethnic, and which will become increasingly multi-ethnic, are too big to solve their internal problems and too small to solve their problems externally. The national state is also outmoded because of technological developments.

In summary, the world is not neatly divisible into ethnicities congruent to a particular geopolitical space. Instead we have instant, global communications with the ability to move rapidly between continents. To manage this interdependent world we need new democratic institutions that take into account the historical experiences and objectives described below.

V. THE TRANSFORMATION OF SOVEREIGNTY

The delegitimizing of the nation state as a political form also enables us to reconsider the model of legal sovereignty.²⁸ A radical reconsideration of the international system is possible, precisely because of the deadly debacle of 1914–1945.

A. *The Transformation of Nation States*

The model proposed by the founders of the European project, to create interdependence by a customs union, was intended to replace the nation state by an interdependent continental system to break the equation of war and profit.

Before the Treaty of Rome, especially before the Second World War, war could be profitable for a state or a social class of a state because the state was relatively autarchic and economically hermetic—trade and territory were united. Since the Treaty of Rome, European states have become ever more interdependent, which implies that a war among them would be unprofitable. If this model of trade and interdependence making war less likely is correct, then how is the model to be applied globally? The World Trade Organization

27. Philippe Sands, *Lawless World: The Cultures of International Law*, 41 TEX. INT'L L.J. 387, 390 (2006). See also Krulic, *supra* note 26, at 26. ("l'accroissement du nombre d'acteurs . . . rend plus difficiles la gestion et la stabilité du monde interétatique") ("The increase in the number of actors . . . makes the management and stability of the inter-state world more difficult.")

28. ("We are encountering today an ever more widespread belief that a world map composed of sovereign states no longer provides—if it ever did—a useful conception of how the world as a whole is constituted.") Richard Falk, *Evasions of Sovereignty*, in *CONTENDING SOVEREIGNTIES REDEFINING POLITICAL COMMUNITY* 61, 61 (1990). ("Nous rencontrons aujourd'hui une croyance de plus en plus commun qu'une carte-mondiale composée des Etats souveraines ne présente pas encore—s'il a jamais le présenté—une conception utile du monde tel qu'il se constitue."). *Id.*

(WTO) is a limited answer in that it only addresses trade, not political, security or cultural issues.²⁹ Of course, both the Commonwealth and the Francophonie allow possible routes for expansion of the EU. It can also happen by a replication of the European model, for example, in Mercosur-Andean Pact, Asean, and more recently by the National American Free Trade Agreement (NAFTA).

Yet two risks remain. First, these supranational elite governance structures are captured by and serve the interests of elites. These multilateral organizations should not remain simply administrative and isolated from the peoples. They must also have a democratic link to the citizens. Another risk is that these multilateral systems, whatever their form, could grow into new empires with new military ambitions. In other words, we must avoid a deadly replay of the 19th and 20th century competition between the five great powers of Europe replicated and transposed globally as a destructive zero sum competition between the world's major trading blocs (Asean, the EU, NAFTA, and Andean Pact/Mercosur). That would simply replicate the problem we are trying to avoid, and this time the stakes will be nuclear. In short, interdependence between these major trading blocs must be sustained by global organizations such as the Organization for Economic Co-operation and Development (OECD), the WTO, and the International Monetary Fund (IMF). To that end the WTO serves to set the minimum free-trade standards for the world, with the aim to seeing even freer trade regionally.

B. Challenges for the New International System

And here we see the risk. First, these institutions still have no democratic content. They in no way guarantee a minimum level of well being for the working class, which creates the possibility of delegitimization and fundamentalism as a reaction by people forced to cope with economic "restructuring". Another similar challenge is that these institutions must somehow take into account the needs and interests of third world countries. Otherwise, we will still see fundamentalism, poverty (which leads to overpopulation), the risk of wars, and terrorism. The liberal institutions intended to secure peace through interdependence and trade would otherwise be merely vacuums for raw materials—with no regard for the standard of living and development of third world countries—creating the illusion of wealth, the reality of resentment and the risk of rebellion.

29. WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 1 2007, http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

C. *How to Reconceptualize the State?*

A usual view of modernity is that liberal revolutions transferred the sovereignty of princes to the people represented by their elected representatives. One of the criticisms of that view is the fictitious nature of this transfer and the inexactitude as to the powers supposedly transferred. Reconceptualizing this transfer of power by examining and applying it to sub-national and super-national units as well as redefining sovereignty, the state and power are ways to meet the criticisms of the liberal state.

1. Disintegration by Sublimation

The most obvious direction of transformation is the transfer of powers, of state power to supra-national bodies such as the European Union (EU), the United Nations (UN), and the World Trade Organization (WTO), etc. Although such a transfer is a policy needed to manage the world, without democratic supports such transfers of power will have no legitimacy and will serve the interests of elites, only.

2. Disintegration by Devolution

Magnusson saw that the polity begins with a closure to create a community.³⁰ For Magnusson, this closure is the precondition of politics. Thus, for Magnusson, the function of state is not to be autarchic, but to establish order.³¹

The problem with this perspective is that it makes enthymematic presumptions about and out of the order which it creates. As Hobbes, Magnusson appears to conceive of it as a state of nature, which is brutal—the war of all against all. However, the state of nature is a fiction. Moreover, humans are not *a priori* prone to either violence or gentility. However, because it is almost always more difficult to initiate an act than to choose inaction, there is a certain inertia in human affairs. So I would say that the function of the social body, whatever its form, is to preserve order.

Magnusson, nevertheless, raises other very interesting issues. First, he shows the circularity of “nation” and “state,” and how each defines and justifies the other—the state as physical incarnation of the ideal of the nation, the nation as justification for acts of state.³² He implies with this circularity that: 1) the two concepts are empty of meaning—they are tautologies, 2) that one (the

30. Warren Magnusson, *The Refication of Political Community*, in *CONTENDING SOVEREIGNTIES REDEFINING POLITICAL COMMUNITY* 45, 45 (1990).

31. *Id.* at 47.

32. *Id.* at 49.

nation) is irrational and that the other (the state) is authoritarian or even totalitarian.

Either in addition to or in place of, the design of sovereignty he offers the idea of movements.³³ Their advantage is that they are like the modern world generally: permeable. He defines them by their attributes:

Multiplicity: There is a multiplicity of movements, which are not mutually exclusive.³⁴

- a) Impermanence: Movements come and go. They are not permanent.³⁵
- b) Inchoate: Membership in movements is not determined or is indeterminable.³⁶
- c) *Inclusive*: The movements seeking to integrate rather than exclude.³⁷
- d) Without borders: Movements are not geographically connected.³⁸

Despite the ambiguity, Magnusson sees movements as real communities, because they include the individual, trying to give their members a way to voice their political views.³⁹ Thus, I prefer to develop a communitarian perspective on sovereignty, which looks to the relationships between individuals and the organs of state power at various levels—among each other and not merely at the level of the supposedly absolute powers of these bodies over the individual.

D. Reconceptualization of Sovereignty: The State Powers Necessary for Our Era

The powers of the state necessary for our era are a limitation of state powers on the lives of people—state power should and will be used to limit state power. The militarized national security state has been rendered obsolete, paradoxically, due to the vast destructive power of nuclear weapons—and so much the better. Nuclear war is suicidal and that is one reason war is no longer a key aspect of inter-state relations, at least among nuclear armed states. Also, needed is an expansion of duties of the state to ensure the welfare of people. The specialization of state powers into police powers, economic powers, and military power is necessary. Functionally defined organs of governance should

33. *Id.* at 45.

34. *Id.* at 52.

35. Magnusson, *supra* note 30, at 52.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

be implemented at the various levels (sub-national, national, and super-national) depending on the specific nature of their powers. Through a process of devolution of powers to sub-national entities as well as through subsumation of other powers to supra-national entities and through a redefinition of sovereignty, the international system can be transformed further to meet the needs of our era. This transformation is necessary because the nation state has failed catastrophically and is indicted for the bloody wars that have characterized the 20th century. The legal consequence of this conclusion is the need to create legal and political institutions at the international level.